Catholic University Law Review

Volume 60
Issue 4 *Fall 2011*

Article 6

2011

# A License to Lie: The Private Securities Litigation Reform Act's Safe Harbor for Forward-Looking Statements Does Not Protect False or Misleading Statements When Made with Meaningful Cautionary Language

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# A LICENSE TO LIE: THE PRIVATE SECURITIES LITIGATION REFORM ACT'S SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS DOES NOT PROTECT FALSE OR MISLEADING STATEMENTS WHEN MADE WITH MEANINGFUL CAUTIONARY LANGUAGE

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The single disjunctive term "or" has toppled one of the basic goals of federal securities laws: "to protect investors."[1] The federal securities laws seek to promote investor protection by providing public companies with a guide as to what information they may, must, and must not disclose.[2] Disclosure not only benefits the investor, but also leads to efficiency in the capital markets by lessening the need for government regulation.[3] Federal regulation of the securities markets was a response to the 1929 stock market crash and the following Great Depression—a time when defrauding investors was highly prevalent.[4] As a result, Congress enacted the federal securities laws "to foster

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1. Shores v. Sklar, 647 F.2d 462, 470 (5th Cir. 1981) ("The Supreme Court has held that the [securities] acts were designed 'to protect investors against fraud and . . . to promote ethical standards of honesty and fair dealing.'" (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976))); *see also* Walter C. Somol, *Dredging the Safe Harbor for Forward-Looking Statements—An Analysis of the Private Securities Litigation Reform Act's Safe Harbor for Forward-Looking Statements*, 32 SUFFOLK U. L. REV. 265, 266 (1998) ("The essential, continuing goals of the Securities Act of 1933 . . . and the Securities Exchange Act of 1934 . . . are to protect investors, promote disclosure of information to investors, and ensure confidence in the securities markets." (citations omitted)).

2. *See* Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 418 (2003) (stating that federal securities laws help align the "asymmetr[y]" among companies and investors with regard to information gaps by requiring "extensive disclosures"); *see also* Jennifer O'Hare, *Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-fraud Provisions of the Federal Securities Laws*, 70 U. CIN. L. REV. 475, 479 (2002) (finding that, in addition to mandatory and voluntary requirements, anti-fraud provisions in the federal securities laws seek to prohibit companies from making false statements in their disclosures as well).

3. *See* Paredes, *supra* note 2, at 418 (discussing how disclosure better equips an investor to guard against corporate fraud, and thus lessens the need for government intervention).

4. Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of the Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 534 (1999). State "Blue-Sky" laws, which regulated financial markets prior to the enactment of the federal

fair play and insure the integrity of the markets."[5] The Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) equipped regulators and injured investors with anti-fraud provisions,[6] which were designed to ensure the trustworthiness and accuracy of disclosed information,[7] thus leading to integrity in the capital markets.[8] Although the anti-fraud provisions of the federal securities laws prohibit the making of materially false or misleading statements,[9] section 21E(c) of the Exchange Act not only permits, but in fact protects certain forward-looking statements even if they are false or misleading.[10]

Section 21E(c) provides a "safe harbor" for public companies making forward-looking statements[11] provided that the companies adhere to certain parameters set forth in the statute.[12] It is within the language and structure of

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securities laws had limited jurisdiction, limited enforcement procedures, and many exemptions. Veronica H. Montagna, *The First Prong of the Safe Harbor Provision of the Private Securities Litigation Reform Act: Can it Still Provide Shelter From the Storm in the Wake of* Asher v. Baxter International Inc.?, 58 RUTGERS L. REV. 511, 515 (2006).

5. Welle, *supra* note 4, at 535.

6. Securities Act of 1933 § 11(a), 15 U.S.C. § 77k(a) (2006) (offering a private right of action for registration statements containing false or misleading statements); *Id.* § 12(a)(2), 15 U.S.C. § 77l(a)(2) (giving rise to a private right of action for materially misleading statements in a prospectus or oral communication); Securities Exchange Act of 1934 § 10b, 15 U.S.C. § 78j(b) (prohibiting the use of any manipulative or deceptive device when buying or selling securities); *Id.* § 18, 15 U.S.C. § 78r (creating a private right of action for anyone who relied on knowingly misleading statements).

7. O'Hare, *supra* note 2, at 479 (explaining how the anti-fraud provisions of the federal securities laws set forth safeguards to ensure the disclosure of information is "complete and accurate").

8. Paredes, *supra* note 2, at 422.

9. *See* O'Hare, *supra* note 2, at 479–80 (noting that Rule 10b-5, the general anti-fraud provision of the federal securities laws, prohibits companies from making "a material misrepresentation or omission in connection with the purchase or sale of a security").

10. *See* Securities Exchange Act of 1934, § 21E, 15 U.S.C. § 78u5 (2006).

11. *Id.* § 21E(c). A "forward-looking" statement is defined by the Exchange Act to mean:

> (A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial terms;
>
> (B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;
>
> (C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the [SEC];
>
> (D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);
>
> (E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or
>
> (F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the [SEC].

*Id.* § 21E(i)(1).

12. *See id.* § 21E(c). The requirements of the "safe harbor" apply:

those parameters that the current conflict exists, pitting a plain language interpretation against a logical outcome.[13] Congress, by including a disjunctive term among the requirements necessary to qualify for coverage under section 21E(c),[14] essentially tolerates the making of false or misleading statements so long as they are made with "meaningful cautionary" language.[15] To fully appreciate this anomaly, the text and structure of the federal statute must be further explored.

The Exchange Act, which encompasses section 21E(c), governs securities trading and establishes the Securities and Exchange Commission (SEC) as the federal regulatory authority in charge of enforcing the federal securities laws.[16] The safe harbor for

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> [I]n any private action arising under this title that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, [an issuer] . . . shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—
>
> (A) the forward-looking statement is—
>
> (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or
>
> (ii) immaterial; or
>
> (B) the plaintiff fails to prove that the forward-looking statement—
>
> (i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or
>
> (ii) if made by a business entity; was—
>
> (I) made by or with the approval of an executive officer of that entity; and
>
> (II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

*Id.*

13. *See In re* Stone & Webster, Inc., Sec. Litig., 414 F.3d 187, 211–12 (1st Cir. 2005) (recognizing that the plain language of the safe-harbor provision appears ambiguous, but, in application, protects statements that may be false or misleading—a result contrary to the goals of the anti-fraud provisions of the federal securities laws).

14. Securities Exchange Act of 1934 § 21E(c).

15. *Id.* § 21E(c)(1)(A)(i).

16. *Id.* § 4(a), 15 U.S.C. § 78d(a) (establishing the Securities and Exchange Commission and outlining its composition, which must include five commissioners, appointed by the President and approved by the Senate); *see also* THOMAS LEE HAZEN, SECURITIES REGULATION IN A NUTSHELL 196 (10th ed. 2009) (explaining that both the Exchange Act and SEC regulate securities brokers and securities markets); Montagna, *supra* note 4, at 516 (describing the SEC's broad oversight and enforcement authority, noting its power to conduct investigations and bring enforcement actions against alleged violations, while also "accept[ing] filings for registration of securities, proxy solicitations and periodic disclosures by companies subject to the reporting requirements of the Exchange Act"); Roland L. Redmond, *The Securities Exchange Act of 1934: An Experiment in Administrative Law*, 47 YALE. L.J. 622, 624 (1938) ("The Securities Exchange Act of 1934 has four main purposes: first, the regulation of securities exchanges; second, the prevention of the excessive use of credit for speculation; third, the prevention of manipulation;

forward-looking statements entered statutory existence with the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA).[17] To prevent abusive litigation, Congress amended the Exchange Act to include section 21E(c) as a safe harbor for certain types of forward-looking statements.[18] Congress also included section 21E(c) as part of the Exchange Act because of the existing common law bespeaks-caution doctrine.[19]

Section 21E(c) does not protect all forward-looking statements;[20] rather, the safe harbor protects only those statements specifically enumerated within the provision.[21] The safe harbor provides protection for a written or oral

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and fourth, the disclosure of adequate information in regard to securities dealt in on exchanges." (citing Securities Exchange Act of 1934 §§ 5–10, 12–13, 19)).

17. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2006)); Somol, *supra* note 1, at 275–76 (discussing how the PSRLA included a safe harbor for forward-looking statements to encourage corporate projections and to equip investors with such information when making investment decisions).

18. *See* Private Securities Litigation Reform Act, § 102, 109 Stat. at 753–54 (codified as amended at 15 U.S.C. § 78u-5); Somol, *supra* note 1, at 275–76 (noting that the PSLRA and the safe-harbor provision help "curb abusive private securities litigation," but also promote the "dissemination of forward-looking information"); *see* Marc H. Folladori, *Protecting Forward-Looking Statements: The Private Securities Litigation Reform Act of 1995*, 1710 PLI/CORP. 549, 558 (2009) ("[The PSLRA] contains a seemingly explicit road map for protection against private securities fraud litigation based on projections of future results that later turn out to be inaccurate."). Legislative history for the PSLRA observes:

> [The PSLRA] seeks to protect investors, issuers and all who are associated with our capital markets from abusive securities litigation. This legislation implements needed procedural protections to discourage frivolous litigation. It protects outside directors, and others who may be sued for non-knowing securities law violations, from liability for damage actually caused by others . . . [a]nd it establishes a safe harbor for forward looking statements, to encourage issuers to disseminate relevant information to the market without fear of open-ended liability.

H.R. REP. NO. 104-369, at 32 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 731.

19. Emp'rs. Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1132 (9th Cir. 2004) ("The PSLRA created a statutory version of [the bespeaks-caution] doctrine by providing a safe harbor for forward-looking statements identified as such, which are accompanied by meaningful cautionary statements."); *see also* Stephen M. Muniz, Note, *The Private Securities Litigation Reform Act of 1995: Protecting Corporations from Investors, Protecting Investors from Corporations, and Promoting Market Efficiency*, 3 NEW ENG. L. REV. 655, 691 (1997) (asserting that the current statutory safe-harbor provision codifies the bespeaks-caution doctrine because of the exclusion of forward-looking statements). Although there is no uniform definition, the bespeaks-caution doctrine is a judicially created mechanism that immunizes a defendant-corporation from a liability if its securities-related documents containing "forward-looking representations contain[] enough cautionary language or risk disclosure." Jonathan L. Booze, Comment, *A Comparative Analysis of the Application of the Bespeaks Caution Doctrine to Forward-Looking Statements*, 47 U. KAN. L. REV. 495, 501 (1999) (quoting Donald C. Langevoort, *Disclosures that "Bespeak Caution,"* 49 BUS. LAW. 481, 483 (1994)).

20. *See* Securities Exchange Act §§ 21E(c)(1)(A)(i), (B)(i) (requiring that a forward-looking statement possess sufficient cautionary statements or that the plaintiff fails to show the speaker knew the forward-looking statement was false or misleading when it was made); *id.*

forward-looking statement provided, in relevant part, that the statement is:

> (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or
>
> (ii) immaterial; *or*
>
> (B) the plaintiff fails to prove that the forward-looking statement—
>
> (i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading.[22]

Thus, the statutory provision extends protection to three types of forward-looking statements, two of which this Comment will focus on.[23] Prong A protects an identified forward-looking statement provided it is "accompanied by meaningful cautionary statements."[24] Prong B protects a forward-looking statement if the plaintiff fails to prove that it was made with the actual knowledge that the statement was false or misleading.[25] Because prongs A and B are separated by a disjunctive term, the plain language of the statute appears to support the proposition that Prong A and Prong B are

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§ 21E(b)(2)(C)–(D) (prohibiting protection under the safe harbor for forward-looking statements "made in connection with a tender offer" or "made in connection with an initial public offering").

21. *Id.* § 21E(c)(1) (providing the statutory language and framework of the safe harbor). Many times defendants seeking protection under the statutory safe harbor, are alleged to have violated Rule 10b-5, one of the most utilized anti-fraud provisions in the federal securities laws. *See* 17 C.F.R. § 240.10b-5 (2009) (Rule 10b-5); Erin M. Hardtke, Comment, *What's Wrong With the Safe Harbor for Forward-Looking Statements? A Call To The Securities and Exchange Commission to Reconsider Codification of the Bespeaks Caution Doctrine*, 81 MARQ. L. REV. 133, 133–34 (1997) (stating that forward-looking statements are highly susceptible to fraud allegations under Rule 10b-5, the "catch-all" anti-fraud provision). A plaintiff alleging a violation of Rule 10b-5 of the Exchange Act must satisfy six elements to have a valid cause of action. Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (identifying the six elements as "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation").

22. Securities Exchange Act § 21E(c)(1)(A)–(B) (emphasis added).

23. Richard A. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has it Changed the Law? Has it Achieved What Congress Intended?*, 76 WASH. U. L.Q. 645, 652 (1998) (explaining how the safe harbor for forward-looking statements shields companies when the forward-looking statement is: (A) "accompanied by meaningful cautionary language," (B) "immaterial," or (C) the company "lacked the requisite state of mind to commit fraud"). This Comment will not discuss the materiality test, but it should be noted that the safe harbor requires that the forward-looking statement at issue be "material" for a civil litigant to have a claim. Securities Exchange Act § 21E(c)(1)(A)(ii) (applying the safe-harbor provision to cases involving "an untrue statement of a *material* fact or omission of a *material* fact," but not imposing liability on a person for a forward-looking statement that is "immaterial" (emphasis added)).

24. Securities Exchange Act § 21E(c)(1)(A)(i).

25. *Id.* § 21E(c)(1)(B).

independent of one another.[26] However, this interpretation begs the question of whether section 21E(c) protects a forward-looking statement made with the actual knowledge that it is false or misleading, but which is nonetheless accompanied with "meaningful cautionary language."[27]

This Comment addresses the problems accompanying the application of the plain language of the safe-harbor provision and analyzes the way courts should interpret section 21E(c) of the Securities Exchange Act of 1934. Part I reviews the regulatory developments preceding the bespeaks-caution doctrine—the origin and common law equivalent of the current statutory safe-harbor provision. This section also highlights the legislative history of the safe-harbor provision and the text of the statute. Part II reviews the divergent case law interpreting the statutory provision. This Part first examines decisions made by courts that reject the plain-language interpretation and ultimately prohibit *all* false misleading statements. Next, this Part focuses on courts that have erroneously adhered to the plain-language interpretation, and created the potential for dissemination of false or misleading information into securities markets. Part III analyzes why a strict adherence to the text of the statute is not suitable for evaluating the dissemination of statements in connection with the sale of securities. This Part also looks to courts that have wrestled with the language of the statute in an attempt to enact a formidable rule considering both the plain language of the statute and the practical consequences of interpreting it as such. Finally, Part IV concludes that adherence to the plain language of the statute will bring about the illogical result of tolerating false or misleading statements made in the public marketplace, and that courts should employ a more practical interpretation by considering Prong A and Prong B of the safe harbor in conjunction with one another.

## I. THE ORIGIN OF THE STATUTORY SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS: SEC RULE 175 AND THE BESPEAKS-CAUTION DOCTRINE

A complete analysis of the statutory safe-harbor provision requires a discussion of the regulatory developments prior to the judicially created bespeaks-caution doctrine. The SEC addressed the notion of protecting forward-looking statements before the issue was considered in a court of law.[28]

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26. Allan Horwich, *Cleaning the Murky Safe Harbor for Forward-Looking Statements: An Inquiry into Whether Actual Knowledge of Falsity Precludes the Meaningful Cautionary Statement Defense*, 35 J. CORP. L. 519, 539–41 (2010) (discussing cases that rely on a strict interpretation of the disjunctive language in the statutory safe harbor, and hold that satisfaction of one prong forecloses the need to analyze the second prong).

27. Securities Exchange Act § 21E(c)(1)(A)–(B) (declaring that the safe-harbor provision's protection applies when statements are made with sufficient cautionary statements *or* when the plaintiff fails to prove that the defendant acted with actual knowledge in making the false statement (emphasis added)).

28. Royce de R. Barondes, *The Bespeaks Caution Doctrine: Revisiting the Application of Federal Securities Law to Opinions and Estimates*, 19 J. CORP. L. 243, 247–49 (1994) (discussing how, before the common law development of the bespeaks-caution doctrine, the SEC initially

### *A. The SEC's Consideration of Protection for Forward-Looking Statements and the Implementation of SEC Rule 175*

Prior to the 1970s, the SEC prohibited companies from making projections in documents filed with the Commission.[29] The motivating factor for the prohibition stemmed from the SEC's concern that such information would potentially misled inexperienced or unsophisticated investors, thus causing further inequality among investors.[30]

After taking the original rule under consideration, the SEC formed the Wheat Commission to determine whether forward-looking statements "should be permitted or mandated in Commission filings."[31] Although the Wheat Commission opposed permitting projections,[32] the SEC continued to conduct hearings and receive public comments regarding whether to lift the ban on forward-looking statements.[33] In 1973, the SEC determined that it would neither mandate disclosure of forward-looking statements, nor prohibit the

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prohibited the dissemination of forward-looking statements, but eventually changed that policy in 1979 with the adoption of Rule 175).

29. *Id.* at 247–48 (reviewing the SEC's established policy of prohibiting projections made in documents filed with the Commission).

30. *See* Safe Harbor for Forward-Looking Statements, Securities Act Release No. 7101, Exchange Act Release No. 34831, Investment Company Act Release No. 20619 [1994–1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,436 (Oct. 14, 1994) [hereinafter Exchange Act Release No. 34831] (concluding that forward-looking information was "inherently unreliable, and that unsophisticated investors would place undue emphasis on the information in making investment decisions" (citing SEC. AND EXCH. COMM'N, DISCLOSURE TO INVESTORS: A REAPPRAISAL OF ADMINISTRATIVE POLICIES UNDER THE 1933 AND 1934 ACTS 96 (1969) [hereinafter WHEAT REPORT])). The Commission's rationale is best articulated by Harry Heller, former member of the Commission's Division of Corporate Finance, who stated,

> Conjectures and speculations as to the future are left by the Act to the investor on the theory that he is as competent as anyone to predict the future from the given facts. Since an expert can speak with authority only as to subjects upon which he has professional knowledge . . . attempts by companies to predict future earnings on their own or on the authority of experts have almost invariably been held by the Commission to be misleading because they suggest to the investor a competence and authority which in fact does not exist.

Harry Heller, *Disclosure Requirements Under Federal Securities Regulation*, 16 BUS. LAW. 300, 307 (1961).

31. Exchange Act Release No. 34831, *supra* note 30 (noting that the Wheat Commission was created in response to increasing pressure to revoke the SEC's prohibition on forward-looking statements). The Wheat Commission determined that while investors generally consider estimates of future earnings, the risk of voluminous litigation, coupled with undue investor reliance on such information, outweighed any consideration of permitting forward-looking statements. WHEAT REPORT, *supra* note 30, at 95–96.

32. WHEAT REPORT, *supra* note 30, at 96.

33. *See* Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362, Exchange Act Release No. 9984, [1972–1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,211 (Feb. 2, 1973) (discussing public interest on the topic and detailing the information gathered from hearings).

dissemination of such information.[34] In explanation, the SEC revealed an inclination to follow its own historical policy, stating that it "has never required a company to publicly disclose its projections."[35]

In 1976, the SEC formed the Advisory Committee on Corporate Disclosure (Advisory Committee) to analyze policy issues within the Commission's Division of Corporate Finance.[36] Among other issues, the Advisory Committee addressed forward-looking statements.[37] The Advisory Committee made a number of recommendations with regard to permitting forward-looking statements,[38] including a requirement that safe-harbor protection would apply only to forward-looking statements made in good faith and with a reasonable basis.[39] To guard against misleading projections, the Advisory Committee also encouraged the SEC to reiterate to companies the need to keep forward-looking statements reliable and truthful.[40]

Taking the Advisory Committee report into consideration and incorporating its recommendations, the SEC promulgated Rule 175 under the Securities Act and Rule 3b-6 under the Exchange Act.[41] These rules protect companies from liability if they make forward-looking statements in good faith and on a reasonable basis, so long as the companies originally made the statements in SEC fillings.[42] Section 21E(c) shares some, but not all, of Rule 175's requirements.[43]

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34. *Id.* (proposing rules permitting, but not mandating, the disclosure of forward-looking information).

35. *Id.*

36. Statement on Disclosure of Projections of Future Economic, Securities Act Release No. 5699, Exchange Act Release No. 12371, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,461 (Apr. 23, 1976) (noting the SEC's decision to neither encourage nor prohibit protections, but commenting "that even the most carefully prepared and thoroughly documented projections may prove inaccurate").

37. *Id.*

38. *See* STAFF OF H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 95TH CONG., REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION 344–45 (Comm. Print 1977) [hereinafter REPORT OF THE ADVISORY COMMITTEE] (encouraging disclosure of projections as well as the need for an accompanying safe-harbor provision); Safe Harbor Rule for Projections, Securities Act Release No. 6084, Exchange Act Release No. 15944, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,117 (June 25, 1979) (discussing the adoption of a safe-harbor provision for projections).

39. REPORT OF THE ADVISORY COMMITTEE, *supra* note 38, at 344–45. In the Advisory Committee's opinion, the burden should be placed on the injured party to show a lack of good faith or reasonable basis. *Id.*

40. *Id.* at 346.

41. 17 C.F.R. § 230.175 (2009); *see* Barondes, *supra* note 28, at 248–49 (recognizing the SEC's decision to follow the Committee's recommendations when adopting the final rule in 1979).

42. 17 C.F.R. §§ 230.175, 240.3b-6.

43. *See* Hardtke, *supra* note 21, at 146–47 ("The safe harbor [of section 21E] protects only forward-looking statements, the definition of which was borrowed in large part from Rule 175.

### B. Dicta to Doctrine: The Judicial Uprising of the Bespeaks-Caution Doctrine

In addition to taking into account the SEC's findings and rulemaking, the current statutory safe harbor also incorporates characteristics of the judicially created bespeaks-caution doctrine.[44] A large part of the doctrine's influence on section 21E may be a result of the doctrine's adoption by "almost all federal courts of appeals."[45] Although the doctrine originated within a mere footnote of an Eighth Circuit opinion,[46] other federal courts have molded the bespeaks-caution doctrine into its current version.[47]

#### 1. The Second and Sixth Circuits: The Original Creators of the Federal Common Law's Bespeaks-Caution Doctrine

The footnote that gave rise to the bespeaks-caution doctrine appeared in *Polin v. Conductron Corp.*,[48] a case involving a plaintiff who claimed that allegedly fraudulent statements made in a company's proxy statement, press release, and reports violated the federal securities laws' anti-fraud provisions.[49] The Eighth Circuit responded with a finding that "[t]he terms thus employed bespeak caution in outlook and fall far short of the assurances required for a finding of falsity and fraud."[50]

The bespeaks-caution doctrine first appeared as a substantive legal rationale when articulated by the Second Circuit in *Goldman v. Belden*.[51] Using the bespeaks-caution doctrine in its analysis, the court found that the plaintiff adequately stated a claim by showing that the defendant had been aware of negative factors that could impact the company, but nonetheless failed to include the requisite cautionary language in its forward-looking statements.[52] Noting the plaintiff's allegation that "there was no note of caution in the defendants' statements and the defendants knew caution was warranted,"[53] the

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But unlike Rule 175, [section 21E] is not limited to documents filed with the SEC; it extends to any statements within its scope.").

44. *See* H.R. REP. NO. 104-369, at 43 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 742 (observing that the safe-harbor provision is "based on aspects of SEC Rule 175 and the judicially created 'bespeaks caution' doctrine"); *see* Hardtke, *supra* note 21, at 146–48 (noting that the safe harbor shares its cautionary prong based on the bespeaks-caution doctrine).

45. Booze, *supra* note 19, at 496.

46. *See* Polin v. Conductron Corp., 552 F.2d 797, 806 n.28 (8th Cir. 1977); Booze, *supra* note 19, at 499 (identifying the *Polin* opinion as the origin of the doctrine).

47. *See* Booze, *supra* note 19, at 499–500; see *infra* Part I.B.1.

48. *Polin*, 552 F.2d at 806 n.28 (emphasis added).

49. *Id.* at 800–03; Barondes, *supra* note 28, at 251; Booze, *supra* note 19, at 499.

50. *Polin*, 552 F.2d at 806 n.28; Barondes, *supra* note 28, at 251 ("The Bespeaks Caution Doctrine had its origins in a footnote in *Polin v. Conductron Corporation*.").

51. Goldman v. Belden, 754 F.2d 1059, 1068 (2d Cir. 1985).

52. *Id.* at 1068–69 (deciding the bespeaks-caution doctrine did not apply because the defendant's forward-looking statements contained optimistic predictions but failed to disclose any knowledge of negative factors).

53. *Id.* at 1068.

Second Circuit fashioned a rule requiring that cautionary language accompany forward-looking statements for companies to be protected from liability.[54] Indeed, today's statutory safe-harbor provision shares this rationale.[55]

The Sixth Circuit, in *Sinay v. Lamson & Sessions Co.*, expanded the bespeaks-caution doctrine to include two additional considerations.[56] First, the court determined that a company is not liable under Section 10(b) or Rule 10b-5[57] if it makes projections in good faith, based on currently available information.[58] Second, the court found it necessary to analyze whether the statement was false or misleading at the time it was made.[59] The current statutory safe-harbor provision reflects a partial adoption of this second consideration.[60]

*2. The Evolution of the Bespeaks-Caution Doctrine: Interpreting and Implementing the Bespeaks-Caution Doctrine Following the Second and Sixth Circuit Decisions*

After the *Goldman* and *Sinay* opinions, circuit courts have customized the bespeaks-caution doctrine to deny protection to knowingly false future projections.[61] In *Mayer v. Mylod*, the Sixth Circuit determined that its earlier

54. *See id.* at 1068–69 (noting that "not all predictions are actionable" but a company's financial forecast that "could have conveyed to a reasonable investor the picture of a quite rosy future" must contain qualifications on the positive projections).

55. *See* Securities Exchange Act of 1934 § 21E(c), 15 U.S.C. § 78u-5(c)(1) (2006) (requiring a defendant seeking protection under the safe-harbor provision to supplement forward-looking statements with "meaningful cautionary statements").

56. 948 F.2d 1037, 1040 (6th Cir. 1991).

57. *Id.*

58. *Id.* (analyzing the forward-looking statements in the context of current economic information held by the company at the time the statements were made).

59. *Id.* ("[A] court must scrutinize the nature of the statement to determine whether the statement was false when made." (citations omitted)).

60. *See* Securities Exchange Act of 1934 § 21E(c) (requiring the plaintiff to prove that the defendant had actual knowledge of a forward-looking statement's falsity at the time it was made).

61. *See, e.g.*, Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1213 (1st Cir. 1996) (finding that although the forward-looking statements were accompanied by adequate cautionary language, the bespeaks-caution doctrine would not preclude the claim if the defendants knew the financial disclosures were false or misleading); *In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 371 (3d Cir. 1993) ("The application of bespeaks caution depends on the specific text of the offering document or other communication at issue, i.e., courts must assess the communication on a case-by-case basis."); *In re* Prudential Sec. Inc. Ltd. P'ships Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996)) ("The doctrine of bespeaks caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away."). Additionally, the doctrine does not apply to statements that were knowingly false when made and may be involved only when the defendant can point to cautionary language that specifically addresses the challenged statement of omission. *In re Prudential Sec.*, 930 F. Supp. at 72. (citing *Trump*, 7 F.3d at 371–72; Huddleston v. Herman & MacLean, 640 F.2d 534, 543–44 (5th Cir. 1981), *rev'd in part on other grounds*, 459 U.S. 375 (1983)).

decision in *Sinay* conflicted with *Virginia Bankshares, Inc. v. Sandberg*, a case decided by the United States Supreme Court.[62] According to the Sixth Circuit, the court's analysis in *Sinay* had stopped short of scrutinizing the misleading nature of the forward-looking statements.[63] Ultimately, the *Mayer* court determined that forward-looking statements are protected if accompanied by meaningful cautionary language, but, when faced with this issue courts must further analyze the misleading nature of the statements.[64]

The Tenth Circuit added another wrinkle to the bespeaks-caution jurisprudence by requiring "materiality."[65] In *Grossman v. Novell, Inc.*, the Tenth Circuit adopted the bespeaks-caution doctrine as a "valid defense to a securities fraud claim."[66] The court expanded the doctrine's protection to cases where the cautionary language appeared in another document separate from the document containing the allegedly false forward-looking statements.[67] According to one commentator, *Grossman*'s expansion of the bespeaks-caution doctrine "lacks both legal and logical justification."[68]

Although the bespeaks-caution doctrine continues to exist at common law, Congress has created a statutory "safe harbor" for forward-looking statements within the federal securities laws.[69]

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62. *See* Mayer v. Mylod, 988 F.2d 635, 639 (6th Cir. 1993); *see also* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1097–99 (1991).

63. *Mayer*, 988 F.2d at 639 (stating that "*Sinay* is not entirely consistent with *Virginia Bankshares*" because it failed to consider the truthfulness of the statement); Booze, *supra* note 19, at 511.

64. *Mayer*, 988 F.2d at 639 (highlighting the conflict between the holding of *Sinay*, that there shall be no liability if optimistic statements are accompanied by cautionary language, and *Virginia Bankshares,* in which the Supreme Court expressed concern about false statements regardless of any cautionary language (citing *Va. Bankshares*, 501 U.S. at 1097–99; *Sinay*, 948 F.2d at 1040)).

65. Grossman v. Novell, Inc., 120 F.3d 1112, 1120–21 (10th Cir. 1997) ("Forward-looking representations are . . . considered immaterial when the defendant has provided the investing public with sufficiently specific risk disclosures or other cautionary statements concerning the subject matter of the statements at issue to nullify any potentially misleading effect.").

66. *Id.* at 1121.

67. *Id.* at 1122–23 (observing that the registration statement contained the cautionary language, whereas the press releases and interviews that were "obviously directly related to the transactions" detailed in the registration statement contained the allegedly misleading predictions). Given the context in which the cautionary statements were made and their degree of specificity, the court found the documents at issue to be "immaterial statements of corporate optimism." *Id.* at 1121.

68. Booze, *supra* note 19, at 515.

69. Securities Exchange Act of 1934 §21E(c), 15 U.S.C. § 78u-5(c)(1) (2006); *see* H.R. REP. NO. 104-369, at 43 (1995) (Conf. Rep.) *reprinted in* 1995 U.S.C.C.A.N. 30, 742 (stating that the safe harbor is "based on aspects of SEC Rule 175 and the judicially created 'bespeaks caution' doctrine").

### *C. Codification of the Bespeaks-Caution Doctrine: The Statutory Safe-Harbor Provision for Forward-Looking Statements*

Congress's enactment of a statutory safe-harbor provision for forward-looking statements came about as a means to further one of the federal securities laws' goals: fraud prevention.[70] Although the safe harbor undoubtedly protects public companies,[71] it functions equally as a provision providing investor protection.[72] By protecting forward-looking statements, Congress is arguably encouraging more reliable corporate disclosures,[73] which supports the basic purpose of the federal securities laws—attempting to protect investors.[74]

#### *1. Inquiry into the Legislative History of the Statutory Safe Harbor for Forward-Looking Statements: Necessary, but Not Sufficient*

Generally, when a statute is unambiguous on its face, as the case may be here, consideration of the legislative history is disfavored.[75] Occasionally, however, courts will look beyond the plain language of a facially unambiguous statute for guidance in applying it to a particular set of facts.[76] Therefore, this Comment turns to a brief consideration of the enactment of section 21E(c).

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70. *See* Securities Exchange Act of 1934 § 21E(c); Muniz, *supra* note 19, at 658, 701 (claiming that forward-looking statements are an essential part of capital markets and that the PSLRA has a "stated goal of encouraging forward-looking disclosure while maintaining investor protection"); *see also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) (explaining that the Securities Act was designed "to protect investors against fraud and . . . to promote ethical standards of honesty and fair dealing," while the Exchange Act was enacted to protect investors through regulation and reporting requirements); Somol, *supra* note 1, at 266 (stating that the federal securities laws are intended to protect investors through increased disclosure of information).

71. *See* Horwich, *supra* note 26, at 523–24 (stating that the need to protect public companies from liability prompted the addition of the PSLRA to the Exchange Act).

72. *See* Muniz, *supra* note 19, at 701 ("[B]ecause the cautionary statements must be 'meaningful' . . . investors should have more than enough information at their disposal to assess the likelihood of the forward-looking statement coming to fruition." (citation omitted)).

73. *See id.* at 700 (noting agreement among legal commentators and courts that the safe harbor for forward-looking statements provides sufficient protection against securities fraud).

74. See *supra* note 70.

75. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what is says there." (citations omitted)).

76. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 445 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . . ."); *see, e.g.*, Rubin v. United States, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in 'rare and exceptional circumstances.'" (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 187 n.33 (1978))).

The development of the current safe-harbor provision nearly led to the demise of the PSLRA.[77] Although President William J. Clinton favored the legislation in most respects,[78] he and other opponents of the safe-harbor provision, including Senators Paul S. Sarbanes and Barbara L. Boxer, along with Professor John Coffee, an expert in the field of securities laws, objected that, as written, the safe harbor essentially permitted the dissemination of false or misleading projections if accompanied by sufficient cautionary language.[79] Senators Sarbanes and Boxer claimed that the current version of the safe-harbor provision would essentially immunize fraudulent projections from civil liability.[80] Despite these objections, Congress, over presidential veto,[81] enacted the PSLRA, which included Congress's original safe-harbor provision.[82]

### *2. The Plain Language of the Statutory Safe-Harbor Provision for Forward-Looking Statements*

Under the safe-harbor provision, forward-looking statements may be protected whether "written or oral."[83] Most importantly, the safe-harbor provision extends to two types of forward-looking statements. Prong A

77. *See* Message to the House of Representatives Returning Without Approval the Private Securities Litigation Reform Act of 1995, 2 PUB. PAPERS 1912, 1912–13 (Dec. 19, 1995) [hereinafter Veto Message] (vetoing the PSLRA out of fear that the safe harbor would bar genuinely defrauded investors from any recovery); *see also* Alfred Wang, Comment, *The Problem of Meaningful Language: Safe Harbor Protection In Securities Class Action Suits After* Asher v. Baxter, 100 NW. U. L. REV. 1907, 1917 (2006) (noting that President Clinton vetoed the bill with just one hour to spare).

78. *See* Veto Message, *supra* note 77, at 1912 (indicating the President's general support for the bill, including certain safe harbor language, but articulating his refusal to sign the legislation in its then-current form, believing it would result in "investors find[ing] their legitimate claims unfairly dismissed").

79. *See* 141 CONG. REC. 38,201 (1995) (expressing concerns that the safe harbor was a "license to lie," and "even if [a] knowingly false statement is made, the defendant escapes liability if 'meaningful cautionary statement[s]' are added to the forward-looking statement").

80. *See id.* at 38,198 (statement of Sen. Sarbanes) ("Projections by corporate insiders will be protected, even though they may be unreasonable, misleading, and fraudulent, if accompanied by boilerplate cautionary language."); *id.* at 38,211 (statement of Sen. Boxer) ("Fraudulent future predictions and estimates would be permitted under this bill if those defrauding attach 'some' possible reasons why the prediction might not come true. Those defrauding can hide the real reason that their fraudulent prediction will not come true and they cannot be sued.").

81. *See* Muniz, *supra* note 19, at 690 (discussing the congressional override of President Clinton's veto on December 22, 1995).

82. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 102, 109 Stat. 737, 749–56 (codified at 15 U.S.C. § 78u-5(c)(1) (2006)). This Comment focuses on the safe-harbor provision now in Section 21E(c) of the Exchange Act, codified at 15 U.S.C. § 78u-5(c)(1). Securities Exchange Act of 1934 § 21E(c), 15 U.S.C. § 78u-5(c)(1).

83. Securities Exchange Act of 1934 § 21E(c)(1).

protects a statement that is both identified as a forward-looking statement and also "accompanied by meaningful cautionary statements,"[84] or a forward-looking statement that is "immaterial."[85] Prong B protects any forward-looking statement that an injured party "fails to prove . . . was made with actual knowledge by [the person making the statement] that the statement was false or misleading."[86] Within the safe-harbor provision's plain language, the term of critical importance is the disjunctive term "or" that separates Prong A from Prong B.[87]

Because the plain language of the safe-harbor provision expressly makes Prong A and Prong B independent of one another, it protects all forward-looking statements accompanied by meaningful cautionary statements, even if the person making the statement actually knows that it is false or misleading.[88] Considering the basic premise behind the federal securities laws,[89] such an antithetical outcome invites arguments for a more amendable judicial interpretation.[90]

## II. A FORK IN THE ROAD: CONJUNCTIVE V. DISJUNCTIVE ANALYSIS OF THE SAFE-HARBOR PROVISION

### *A. Dependent Operation: Courts and Commentary Finding That Prong A and Prong B of Safe-Harbor Provision for Forward-Looking Statements Should be Analyzed Conjunctively*

Several cases and commentary support the position that Prongs A and B of the statutory safe-harbor provision should not be read in the disjunctive.[91] Such an assertion conflicts with a plain language interpretation, which instead supports the proposition that the two prongs should be read independently.[92]

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84. *Id.* § 21E(c)(1)(A)(i).

85. *Id.* § 21E(c)(1)(A)(ii).

86. *Id.* § 21E(c)(1)(B)(i).

87. *See id.* § 21E(c)(1)(A)(ii); *see also* Horwich, *supra* note 26, at 557 ("The language of the statute should be applied as the disjunctive phrases read, with 'meaningful' interpreted without reference to the speaker's knowledge (much less belief) in the truth or falsity of the projection.").

88. See Securities Exchange Act of 1943 § 21E(c)(1)(A)(i).

89. *See supra* notes 1, 5–8, 70 and accompanying text.

90. *C.f.* O'Hare, *supra* note 2, at 479–80 (noting that the anti-fraud provisions of the federal securities laws were enacted to ensure "complete and accurate" disclosures and that a company's dissemination of materially false or misleading statements would be a violation of one of those provisions).

91. *See infra* Parts II.A.2–3.

92. *See infra* Part II.B.

*1. The Natural Relationship: A Case Determining Solely Whether Forward-Looking Statements Are Accompanied by Meaningful Cautionary Language (Prong A), but Which Inevitably Analyzes the Defendant's State of Mind (Prong B)*

In *Lormand v. US Unwired, Inc.*, the Fifth Circuit intertwined Prong A and Prong B in its analysis.[93] The plaintiff alleged that the defendant had made favorable public statements regarding the company's status, despite knowing that certain changes in its operation posed substantial risks.[94] The company did, however, include cautionary disclaimers that were industry specific and detailed a number of risks that could potentially hurt the company's financial stability.[95] However, at the time the projections were made, the company was aware that the offer of such programs was coerced by the network affiliate, thus proving to be financially unfavorable.[96] The court ultimately held that the safe-harbor provision was inapplicable because at the pleading stage, "the plaintiff adequately allege[d] that the defendants actually knew that their statements were misleading at the time they were made."[97] The court further determined that the cautionary language included in the disclaimers was insufficient because it did "not provide sufficiently meaningful caution about clearly present danger that was materializing."[98] Although the court acknowledged that certain warnings were "somewhat specific," the cautionary language nonetheless failed to provide a sufficient warning about the risks that a defendant knew were being realized.[99]

*Lormand* supports the proposition that a proper analysis of Prong A is dependent upon an analysis of Prong B.[100] However, as additional cases will demonstrate, some courts have confronted the issue differently, when determining whether Prongs A and B should be analyzed independently of one another.

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93. Lormand v. US Unwired, Inc., 565 F.3d 228, 243, 247 (5th Cir. 2009). The plaintiffs alleged that the defendants misled the public by concealing material information regarding a risky business strategy that the defendants knew "would be financially disastrous" for the company. *Id.* at 237.

94. *Id.* at 234, 237–38.

95. *Id.* at 245–46.

96. *Id.* at 252.

97. *Id.* at 244.

98. *Id.* at 247 ("These warnings failed to correct the false impression created by the defendants' public statements or to supply the truth that they omitted . . . that the defendants knew that [certain programs and company changes] threatened to severely harm the company financially by increasing churn and bad debt . . . .").

99. *Id.*

100. *See supra* notes 108–10 and accompanying text.

*2. Cases Holding that Prong A Cannot Be Satisfied If the Statement Is Made With Actual Knowledge that It Is False or Misleading*

Generally, Prong A, unlike Prong B, does not incorporate a subjective analysis.[101] However, in *In re SeeBeyond Technologies Corp. Securities Litigation*, the court determined that an analysis of Prong A must take into account the defendant's state of mind.[102] Moreover, the court cautioned that an objective standard for Prong A was too high and cut against Congress's intent.[103] Accordingly, after finding that the plaintiff sufficiently alleged that (1) defendants knew that statements made in a press release were false or misleading, and (2) the cautionary language in the press release did not identify the risks that made the press release false or misleading, the court concluded that the safe-harbor provision did not protect the forward-looking statements at issue.[104]

Relying on the analysis from *In re SeeBeyond Technologies*, the Federal District Court for the Northern District of California also determined that the cautionary language at issue was insufficient to warrant safe harbor protection because the plaintiffs alleged that (1) the defendant's earning projections were based on the success of a project, and (2) defendant's knew that this project was not successful.[105] Courts outside the Ninth Circuit also adhere to the proposition that a statement made with actual knowledge of its falsity cannot

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101. *See* Ann Morales Olazábal, *Safe Harbor for Forward-Looking Statements Under the Private Securities Litigation Reform Act of 1995: What's Safe and What's Not?*, 105 DICK. L. REV. 1, 13 n.60 (2000) (discussing the three separate avenues for seeking protection under the safe-harbor provision: (1) sufficient cautionary language, (2) immateriality, or (3) defendant's actual knowledge of falsity, and recognizing this third avenue as the only prong that warrants an inquiry into the speaker's state of mind).

102. *See In re* SeeBeyond Techs. Corp. Sec. Litig., 266 F. Supp. 2d 1150, 1165–66 (C.D. Cal. 2003). The court rejected the idea that a defendant may knowingly make a false statement, provided that he includes cautionary language:

> If the forward-looking statement is made with actual knowledge that it is false or misleading, the accompanying cautionary language can only be meaningful if it either states the belief of the speaker that it is false or misleading or, at the very least, clearly articulates the reasons why it is false or misleading.

*Id.* at 1165; *see also In re* Broadcom Corp. Sec. Litig., No. SACV01275GLTMLGX, 2004 WL 3390052, at *3 n.4 (C.D. Cal. Nov. 23, 2004) (observing that the rationale in *SeeBeyond* "is sound and should be adopted by the Ninth Circuit").

103. *See In re SeeBeyond*, 266 F. Supp. 2d at 1166 n.8 ("If an objective standard is adopted for determining whether a factor is 'important,' then it seems this would *heighten* the bar of the first prong of the safe-harbor provision . . . this result seems contrary to congressional intent.").

104. *Id.* at 1167. The court articulated that for cautionary language to be "meaningful" and thus merit safe harbor protection, it must address the statements alleged to be false or misleading. *Id.*

105. Rosenbaum Capital, LLC v. McNulty, 549 F. Supp. 2d 1185, 1190–91 (N.D. Cal. 2008). In its articulation of what constitutes "meaningful" cautionary language, the *Rosenbaum* court relies on the characterization set forth in *In re SeeBeyond*. *Id.* (citing *In re SeeBeyond*, 266 F. Supp. 2d at 1165).

be accompanied by "meaningful" cautionary language.[106] Indeed, the SEC shares a similar view.[107]

### *3. Cases Holding that No Degree of Meaningful Cautionary Language Can Protect a Forward-Looking Statement Made with Actual Knowledge of its Falsity*

Perhaps the strongest pronouncement that Prongs A and B are dependent on one another was made by the Second Circuit in *Milman v. Box Hill Systems Corp.*[108] In *Milman*, the court stated "no degree of cautionary language will protect material misrepresentations or omissions where defendants knew their statements were false when made."[109] Other courts have concurred that if the defendant knew that the statement was false when made, then the defendant may not seek cover under the safe-harbor provision, even if the accompanying cautionary statements sufficiently address the allegedly false statements.[110] The Ninth Circuit stated in dicta that "a strong inference of actual knowledge"

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106. *See, e.g., In re* Nash Finch Co., 502 F. Supp. 2d 861, 873 (D. Minn. 2007) ("[C]autionary language can not be 'meaningful' when defendants know that the potential risks they have identified have in fact already occurred, and that the positive statements they are making are false.").

107. Brief for Securities and Exchange Commission as Amicus Curiae, at 9–10, Slayton v. Am. Express Co., 604 F.3d 758 (2d Cir. 2010) (No. 08-5442-cv), *available at* http://www.sec.gov/litigation/briefs/2010/slayton0110.pdf (taking the position that cautionary language that identifies a risk is not "meaningful" when the company, at the time that it prepared the cautionary language, knew that the risk had already been realized).

108. *See* Milman v. Box Hill Sys. Corp., 72 F. Supp. 2d 220, 231 (S.D.N.Y. 1999).

109. *Id.*

110. *See, e.g.*, Rombach v. Chang, 355 F.3d 164, 173 (2d Cir. 2004) ("Cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired."); Gargiulo v. Isolagen, Inc., 527 F. Supp. 2d 384, 389 (E.D. Pa. 2007) (finding that cautionary language alone is insufficient under the safe-harbor provision if the defendants had actual knowledge that the cautionary statements were false); Andropolis v. Red Robin Gourmet Burgers, Inc., 505 F. Supp. 2d 662, 676 (D. Colo. 2007) (noting that if the plaintiff proves that the speaker of the misstatement knew of its falsity, the statement is actionable, despite the presence of any meaningful cautionary language); Primavera v. Liquidmetal Techs., Inc., 403 F. Supp. 2d 1151, 1159 (M.D. Fla. 2005) (concluding that actual knowledge of falsity vitiates any claim of safe harbor protection); *In re* Cambrex Corp. Sec. Litig., No. 03-CV-4896 (WJM), 2005 WL 2840336, at *8 (D.N.J. Oct. 27, 2005) ("Even if the warnings were sufficient, the safe harbor is not available when the forward-looking statements are made by or with the approval of an executive officer of that entity who had actual knowledge that the statement was false or misleading . . . ."); *In re* Alliance Pharm. Corp. Sec. Litig., 279 F. Supp. 2d 171, 192 (S.D.N.Y. 2003) (rejecting the notion that the safe-harbor provision protects knowingly false statements); Schaffer v. Evolving Sys., Inc., 29 F. Supp. 2d 1213, 1224 (D. Colo. 1998) (finding that forward-looking statements in a press release accompanied by sufficient cautionary language "do[] not fall within the PSLRA's safe harbor provision").

that a statement is false or misleading removes it from the safe-harbor provisions completely.[111]

### *B. Plain Text Interpretation: Courts and Commentary Finding that the Plain Language of the Statutory Safe Harbor for Forward-Looking Statements Requires an Independent Analysis of Prongs A and B*

One legal commentator, Allan Horwich, contends that, based on an examination of legislative history and case law, Prong A and Prong B should be analyzed independently of each other.[112] Although Horwich touches briefly on the plain-language argument, much of his analysis focuses on the relevance of inquiring into the speaker's state of mind (Prong B) when considering whether a forward-looking statement is accompanied with sufficient, meaningful cautionary language (Prong A).[113] He concludes that satisfaction of Prong A—without regard to the speaker's subjective intent—brings a statement within the purview of the safe-harbor provision.[114]

In 2004, the Seventh Circuit issued an opinion that sparked much debate about the statutory safe-harbor provision for forward-looking statements.[115] Judge Frank Easterbrook, writing for the Seventh Circuit in *Asher v. Baxter*, viewed the statutory safe harbor as "a compromise between legislators" that "lacked spirit," but, nevertheless, recognized that the court "must make something of it."[116] The court, solely focusing on Prong A, analyzed the sufficiency of the cautionary language accompanying a company's profit projections without an inquiry into the defendant's state of mind (Prong B).[117] In 2002, Baxter International Inc. (Baxter) made repeated projections, such as

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111. No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp., 320 F.3d 920, 936, 937 n.15 (9th Cir. 2003). Courts taking this approach tend to support the general premise behind the federal securities laws—that Congress intended to protect investors—and, therefore, do not permit the dissemination of false or misleading information into the marketplace, regardless of the degree of cautionary language. *See, e.g.*, *id.* (commenting that allowing the safe-harbor provision to protect knowingly false statements "would eviscerate the 1934 Act altogether"); *see also supra* notes 1–8 and accompanying text.

112. Horwich, *supra* note 26, at 559 ("The first prong of the statutory safe harbor for forward-looking statements should be dispositive where it is satisfied, without requiring that any doubt or lack of belief about the projection be disclosed in order for the cautionary statements to be 'meaningful' . . . .").

113. *Id.* at 529–30 (citing H.R. REP. NO. 104-369, at 43–44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 742–43) (pointing to the language of the House Report to suggest the independence of Prongs A and B).

114. *Id.* at 558.

115. *See* Asher v. Baxter Int'l Inc., 377 F.3d 727, 734 (7th Cir. 2004) (holding that because a determination of how "meaningful" cautionary language is requires extensive discovery, such cases should not be decided at the pleading stage); *see also* Wang, *supra* note 77, at 1908 (discussing the impact of *Asher* in departing from a strict interpretation of the safe-harbor provision by inquiring into a determination of "meaningfulness").

116. *Asher*, 377 F.3d at 728, 732–33.

117. *Id.* at 728, 732–35.

forecasting that their business would produce revenue growth, earnings-per-share growth, and cash flow from operating activities of $500 million or more.[118] Baxter accompanied its projections with cautionary language that was business specific; however, the plaintiffs alleged that (1) the company did not amend the language to reflect the company's economic struggles, and (2) the projections were false because of these difficulties.[119] Judge Easterbrook concluded that it was inappropriate to find whether Baxter satisfied Prong A of the safe-harbor provision based solely on the pleadings, and the court reversed the dismissal of the plaintiff's claim.[120]

In *Miller v. Champion Enterprises Inc.*, the Sixth Circuit had also engaged in an independent analysis of Prongs A and B.[121] Citing the plain language of the statutory safe-harbor provision, the court in *Miller* ruled that inquiry into the speaker's state of mind is "irrelevant" when it comes to Prong A.[122] Thus, under *Miller,* so long as a statement is found to be accompanied by meaningful cautionary statements, it will be within the protection of the safe harbor, regardless of the defendant's knowledge of its falsity.[123] The First Circuit expressed concern with the illogical result of a plain-language reading; however, it found that the safe harbor did not apply on other grounds.[124]

A district court expressed similar concerns, but ultimately adhered to the plain language in analyzing the prongs independently of one another.[125] Still other courts adhere to the plain language of the statute without question,

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118. *Id.* at 728.

119. *Id.* at 728–31.

120. *Id.* at 735. Judge Easterbrook expressed frustration with the ambiguity of Prong A's "meaningful cautionary statement[]" requirement, commenting that it is unclear what language would satisfy the standard. *Id.* at 729.

121. 346 F.3d 660, 672 (6th Cir. 2003).

122. *Id.* at 672 ("[F]or forward-looking statements that are accompanied by meaningful cautionary language, the first prong of the safe harbor provided for in the PSLRA makes the state of mind irrelevant." (internal quotations omitted)).

123. *Id.* (stating that forward-looking statements satisfy the requirements of the safe-harbor provision if they include sufficient cautionary language).

124. *See In re* Stone & Webster, Inc., Sec. Litig., 414 F.3d 187, 212 (1st Cir. 2005). The First Circuit found that:

> The statute thus seems to provide a surprising rule that the mak[ing] of knowingly false and willfully fraudulent forward-looking statements, designed to deceive investors, escapes liability for the fraud if the statement is 'identified as a forward-looking statement and [was] accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.

*Id.* (quoting 15 U.S.C. § 78u-5(c)(1)(A)(i)).

125. Desai v. Gen. Growth Props., 654 F. Supp. 2d 836, 843–44 (N.D. Ill. 2009) (discussing the puzzling idea that Congress would "immunize deliberate liars from liability" but nevertheless finding that the "unambiguous language" of the statute leads to that result whenever *either* prong is satisfied).

holding that the two prongs should be analyzed independently of one another.[126]

The following discussion demonstrates that a plain-language interpretation of the statutory safe harbor should be rejected because: (1) a determination of "meaningfulness" with respect to Prong A necessarily involves an analysis of Prong B, the speaker's state of mind,[127] and (2) such an interpretation would lead to the impractical result of permitting the dissemination of false or misleading statements.[128]

## III. REJECTING THE STRICT INTERPRETATION OF THE SAFE-HARBOR PROVISION

This area of the law remains unsettled and calls for consistency among federal courts in the form of a unified, logical approach to interpreting the statutory safe harbor for forward-looking statements.[129] This section discusses the analytical downfalls of a strict plain-text interpretation of the statutory safe harbor for forward-looking statements by examining the plain language of the safe-harbor provision, analyzing interpretation of the statute by federal courts, and consulting its legislative history.[130] Subsequently, this section maintains that the analysis conducted by *Lormand* provides the proper analytical framework for determining whether forward-looking statements are protected under the safe-harbor provision.[131] Finally, this section discusses how the safe harbor's origin in SEC Rule 175 and the bespeaks-caution doctrine support the theory that false or misleading forward-looking statements should not be protected, no matter the degree of cautionary language.[132]

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126. *See, e.g.*, Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc., 594 F.3d 783, 795–96 (11th Cir. 2010) (stating "an allegation of actual knowledge of falsity will not deprive a defendant of protection by the statutory safe harbor if his forward-looking statements are accompanied by meaningful cautionary language"); Southland Sec. Corp. v. Inspire Ins. Solutions Inc., 365 F.3d. 353, 371 (5th Cir. 2004) (providing dicta supporting a disjunctive analysis by stating that "[t]he safe harbor has two independent prongs: one focusing on the defendant's cautionary statements and the other on the defendant's state of mind."); Yellen v. Hake, 437 F. Supp. 2d. 941, 961 (S.D. Iowa 2006) ("[T]he statute is worded in the disjunctive . . . ."); *In re* Midway Games, Inc. Sec. Litig., 332 F. Supp. 2d 1152, 1168 (N.D. Ill. 2004) (finding that inquiry into the second prong is unnecessary if the first prong is satisfied); *In re* Williams Sec. Litig., 339 F. Supp. 2d 1206, 1220 (N.D. Okla. 2003) ("The safe harbor of the PSLRA provides two primary paths by which a defendant may avoid liability.").

127. *See infra* Part III.

128. *See infra* Part III.

129. *See supra* Part II.

130. *See infra* Parts III.A–C.

131. *See infra* text accompanying notes 160–63.

132. *See infra* Part III.D.

### *A. Plain-Language Interpretation Leads to an Illogical Result of Permitting the Dissemination of False or Misleading Information in the Marketplace*

Generally, courts that find the requirements of Prong A to be independent of those in Prong B do so by relying on the plain language of the statutory safe harbor.[133] According to the plain language of the statute, use of the disjunctive term "or" suggests that Prong A should be assessed independently from Prong B.[134] However, as the Seventh Circuit found in *Asher*, a case analyzing Prong A independently, the plain language is not necessarily unambiguous.[135] If Prong A is the first bite at the apple, the initial determination must be whether the cautionary statements accompanying the forward-looking statements are "meaningful."[136] A determination of what constitutes "meaningful" language must be made regardless of the grammatical term Congress employed to separate Prongs A and Prong B.[137] Furthermore, the determination of what suffices as "meaningful" naturally considers the speaker's state of mind at the time the statement is made.[138] In essence, there is a bridge connecting Prongs A and B, which is found within the plain language of the safe-harbor provision.[139] Therefore, a plain-language interpretation is either: (a) impractical because of ambiguity on the face of the statute, or (b) necessitates consideration of Prong A and Prong B conjunctively.[140]

The Fifth Circuit, in *Lormand,* did not directly address whether Prongs A and B of the safe-harbor provision should be analyzed together.[141] Rather, the court focused on determining whether there was "meaningful cautionary language" necessary to bring the relevant statements within the purview of the

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133. *See, e.g.*, Miller v. Champion Enter., Inc., 346 F.3d 660, 672 (6th Cir. 2003); Desai v. Gen. Growth Props., 654 F. Supp. 2d 836, 843–44 (N.D.III. 2009).

134. Securities Exchange Act of 1934 § 21E(c)(1), 15 U.S.C. § 78u-5(c)(1) (2006) (protecting forward-looking statements so long as they are made with "meaningful cautionary statements" *or* the plaintiff fails to prove that the person making the statement had actual knowledge that the statement was false or misleading at the time it was made).

135. *See* Asher v. Baxter Int'l Inc., 377 F.3d 727, 729 (7th Cir. 2004) (discussing the uncertainty surrounding the safe harbor's requirement that the cautionary language be "meaningful").

136. *See* Securities Exchange Act of 1934 § 21E(c)(1)(A)(i) (noting that a determination of "meaningfulness" is necessary if a defendant seeks protection under Prong A of the safe-harbor provision).

137. *See supra* Part II.A.

138. *See supra* notes 105–07 and accompanying text.

139. *See* Lormand v. US Unwired, Inc., 565 F.3d 228, 247 (5th Cir. 2009) (analyzing whether cautionary language was "meaningful" under prong A, by scrutinizing an inquiry of the defendant's state of mind under Prong B).

140. *See supra* Parts II.A.2–3.

141. In *Lormand*, the Fifth Circuit focused on whether forward-looking statements were accompanied by "meaningful cautionary language." *See Lormand*, 565 F.3d at 244 (finding that the forward-looking statements at issue were not protected by the safe harbor because they were merely "boilerplate").

safe harbor.[142] However, this determination shifted the court's focus to a subjective intent analysis[143] because cautionary language is not "meaningful" unless it cautions against the false or misleading nature of a forward-looking statement.[144] This intertwined analysis is crucial to understanding the natural overlap of Prong A and Prong B.

### *B. The Safe-Harbor Provision's Legislative History: A Vigorous Debate*

Legal commentator Allan Horwich reviews the legislative history of the PSLRA to support his proposition that Prong A does not necessitate an inquiry into the defendant's state of mind as under Prong B.[145] However, reliance on the legislative history in interpreting the statute is exactly what caused the President to veto the PSLRA and the accompanying safe-harbor provision.[146] In addition to the concerns of President Clinton, the Senate also engaged in a debate regarding the language of the safe-harbor provision.[147] Even the Seventh Circuit chimed in when Judge Easterbrook highlighted the lack of clarity in the safe-harbor provision in *Asher*, calling it "a compromise between legislators."[148]

Although, it is understandable to inquire into the safe-harbor provision's legislative history for guidance, supporting an interpretation based on legislative history is inadvisable, especially when the statute went through such contentious and "extensive" debate.[149] Furthermore, the legislative history mentions that the statutory safe harbor comes from the same family as SEC Rule 175 and the bespeaks-caution doctrine.[150] Thus, to consider the legislative history, one must consider it in conjunction with SEC Rule 175 and

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142. *Id.*

143. *See id.* at 247 (deciding that the cautionary language accompanying the forward-looking statement at issue was not "meaningful" because it failed to warn the public that the speaker knew the statements at issue were potentially false or misleading).

144. *See id.*

145. Horwich, *supra* note 26, at 530.

146. Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 946 (discussing President Clinton's veto of the PSLRA due to concerns that the language in the legislative history would "water[] down" key aspects of the safe-harbor provision).

147. *See supra* notes 79–80 and accompanying text; *see also* Horwich, *supra* note 26, at 530–35 (detailing Congress's vigorous debate on the PSLRA).

148. Asher v. Baxter Int'l Inc., 377 F.3d 727, 732 (7th Cir. 2004).

149. *See* Horwich, *supra* note 26, at 530 (referencing the disagreements between legislators over the implications of passing the bill with disjunctive language during the floor debates for the PSLRA).

150. *See* H.R. REP. NO. 104-369, at 43 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 745 (denoting that the safe harbor is "based on aspects of SEC Rule 175 and the judicial created 'bespeaks caution' doctrine").

the bespeaks-caution doctrine, and their impact on the interpretation of the statutory safe harbor for forward-looking statements.[151]

### *C. Strict Interpretation and the "Illogical" Result*

The circuit courts are split on whether the two prongs of the statutory safe harbor should be read together or separately.[152] The Sixth and Eleventh Circuits have strongly opined that satisfaction of Prong A makes an analysis of Prong B irrelevant.[153] However, the Fifth Circuit intertwined the analysis of Prongs A and B when analyzing only meaningful cautionary language (Prong A), but it inevitably analyzed the subjective intent and knowledge of the speaker.[154] In *Asher*, the Seventh Circuit analyzed Prong A exclusively; nonetheless, the court noted the fundamental difficulty in analyzing Prong A independently because of the ambiguity in interpreting the word "meaningful."[155] Finally, the First Circuit interpreted the provision in a way that suggests that Prong A does not encompass a subjective intent element; however, it acknowledged the puzzling result that such an interpretation would have in application.[156]

Reluctance in applying the statute's plain language is warranted because of the illogical and impractical result of creating a "license to lie."[157] Companies can disguise false or misleading projections with cautionary language that a court may deem "meaningful" if the prongs are analyzed independently.[158] The Sixth Circuit may stand as the only unblemished support of treating the prongs disjunctively, as even the Eleventh Circuit has issued varying decisions on this point.[159]

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151. *See supra* Parts I.A–B.

152. *See infra* Part II.

153. *See, e.g.*, Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc., 594 F.3d 783, 795–96 (11th Cir. 2010) ("[A]n allegation of actual knowledge of falsity will not deprive a defendant of protection by the statutory safe harbor if his forward-looking statements are accompanied by meaningful cautionary language"); Miller v. Champion Enter., Inc., 346 F.3d 660, 672 (6th Cir. 2003) ("[I]f the statement qualifies as 'forward-looking' and is accompanied by sufficient cautionary language, a defendant's statement is protected *regardless* of the actual state of mind." (emphasis added)).

154. Lormand v. US Unwired, Inc., 565 F.3d 228, 247 (5th Cir. 2009).

155. *See* Asher v. Baxter Int'l Inc., 377 F.3d 727, 729 (7th Cir. 2004) (stating "a word such as 'meaningful' resists a concrete rendition and thus makes administration of the safe harbor difficult if not impossible").

156. *See supra* note 124 and accompanying text.

157. *See* 141 CONG. REC. 38,201 (1995) (internal quotations omitted).

158. *Id.*; *see, e.g.*, *Miller*, 346 F.3d at 672 (concluding that because the first prong was satisfied, the defendants were protected under the safe-harbor provision irrespective of the evidence suggesting the defendants knew that the forward-looking statements were false).

159. Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc., 594 F.3d 783, 795–96 (11th Cir. 2010) (conceding that sufficient cautionary language will suffice to defeat a claim that the defendants had actual knowledge of the statements' falsity when seeking cover under the

*Lormand* provides a proper and complete analysis of the safe-harbor provision because it considers the safe harbor in its entirety, applying the language to factual circumstances to produce a sound result.[160] A holding that the two prongs overlap, or that satisfaction of Prong A does not foreclose an analysis of Prong B, avoids the unwelcome result of permitting false or misleading statements.[161] *Lormand* applies the statutory language to the facts and develop a natural nexus between the two prongs.[162] Therefore, courts following the *Lormand* analysis will logically conclude that Prong A is dependent, at least in part, on the analysis of Prong B.[163] This form of analysis not only avoids the concerns of using the plain-language approach,[164] it also ensures that the dissemination of potentially false of misleading information is, at the very least, known by investors.[165]

### *D. SEC Rule 175 and the Bespeaks-Caution Doctrine Support the Interpretation that False or Misleading Statements Are Not Protected by the Statutory Safe-Harbor Provision*

Before the enactment of the statutory safe-harbor provision, the bespeaks-caution doctrine addressed the current issue.[166] Given the fact that the safe-harbor provision is a codified version of the bespeaks-caution doctrine, it is instructive to examine the interpretation supported by the common law doctrine.[167] Perhaps the best guidance comes from *In re Prudential v. Securities Inc., Ltd. Partnership Litigation*, which advised that a mere perfunctory warning is insufficient to warrant the protection of bespeaks caution when the cautioner is fully aware of the grave danger that lies ahead.[168]

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safe-harbor provision); *c.f.* Primavera Investors v. Liquidmetal Techs., Inc., 403 F. Supp. 2d 1151, 1159 (M.D. Fla. 2005) (rejecting the application of the safe-harbor provision when statements were made with meaningful cautionary statements, but the plaintiff "allege[d] actual knowledge of falsity").

160. *See supra* Parts II.A.1–2.

161. *See* Lormand v. US Unwired, Inc., 565 F.3d 228, 247 (5th Cir. 2009).

162. *See* Asher v. Baxter Int'l Inc., 377 F.3d 727, 729 (7th Cir. 2004) ("A safe harbor matters only when the firm's disclosures . . . are false or misleadingly incomplete; yet whenever that condition is satisfied, one can complain that the cautionary statement must have been inadequate. The safe harbor loses its function.").

163. *See id.*; *see also Lormand*, 565 F.3d at 247.

164. *See* Desai v. Gen Growth Props., Inc., 654 F.2d 836, 843–44 (N.D. Ill. 2009) (questioning whether Congress "intended to immunize deliberate liars from liability," but nonetheless concluding that it did).

165. *See supra* notes 1–8 and accompanying text (underscoring investor protection through disclosure as the primary goal of the federal securities laws).

166. *See supra* Parts I.B.1–2 (discussing the origin and development of the bespeaks-caution doctrine).

167. *See* H.R. REP. NO. 104-369, at 43 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 742 (stating that the safe harbor draws on characteristics of SEC Rule 175 and the bespeaks-caution doctrine).

168. *In re* Prudential Sec. Inc. Ltd. P'ships. Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996).

Courts analyzing Prongs A and B independently fail to consider that cautionary statements are immaterial if they are made with actual knowledge of falsity and thus should not be protected under the safe-harbor provision.[169]

Before courts employed the bespeaks-caution doctrine, the SEC expressed concerns about the reliability of projections and indicated its willingness to put unsophisticated investors at a disadvantage.[170] When the SEC promulgated Rule 175, good faith and a reasonable basis became prerequisites for protection of a forward-looking statement.[171] The SEC's reluctance to extend protection to projections, coupled with Rule 175's good-faith requirement, suggests that actual knowledge of a statement's falsity would likely bar protection, regardless of cautionary language accompanying it.[172] Even the Advisory Committee recommended that the Commission monitor companies to ensure that projections were truthful and not misleading.[173]

Originally, the idea of protecting forward-looking statements was met with reluctance because of the SEC's concerns regarding the reliability of such statements.[174] In response, the SEC's rationale was thoroughly examined by the Advisory Committee and the SEC subsequently implemented Rule 175, with the necessary precautions to guard against issues of reliability.[175] After the promulgation of Rule 175, the judicially created protection for forward-looking statements developed through the bespeaks-caution doctrine, which implied that cautionary language alone does not save a statement known to be false or misleading.[176] Finally, there is some evidence that the statutory safe harbor is derived from the SEC's investigations and the bespeaks-caution doctrine.[177] Therefore, it is hard to imagine that Congress intended to do away with concerns of reliability, good faith, and the bespeaks-caution doctrine by requiring a strict interpretation of the current safe-harbor provision for forward-looking statements.[178]

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169. *See supra* Part III.A (concluding that the "meaningful" determination is dependent upon a subjective intent analysis).

170. *See* Exchange Act Release No. 34831, *supra* note 30.

171. Barondes, *supra* note 28, at 249.

172. *See* 17 C.F.R. § 230.175(a)–(b) (2009); Barondes, *supra* note 28, at 49 (addressing the required safeguards under Rule 175).

173. REPORT OF THE ADVISORY COMMITTEE, *supra* note 38, at 344.

174. *See* Exchange Act Release No. 34831, *supra* note 30 (noting that the SEC prohibited forward-looking statements because of their unreliability).

175. *See supra* Part.I.A. (discussing the promulgation of Rule 175 and the Advisory Committee's Contribution thereto).

176. *See supra* Part I.B.2 (discussing the judicial evolution of the bespeaks-caution doctrine and the required injury into the misleading nature of the forward-looking statements).

177. *See supra* note 44 and accompanying text (describing how the safe harbor reflects the SEC's concerns and the bespeaks-caution doctrine).

178. *See* Exchange Act Release No. 34831, *supra* note 30; Barondes, *supra* note 28, at 249; *see also* Rubinstein v. Collins, 20 F.3d 160, 171 (5th Cir. 1994); *In re* Prudential Sec. Inc. Ltd. P'ships Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996) (citing Huddleston v. Herman & MacLean,

## IV. CONCLUSION

The statutory safe-harbor provision for forward-looking statements can be an asset for both publicly-traded companies and the investing public. However, the plain-language interpretation of the statutory safe harbor, based solely on a disjunctive term, will invite fraudulent behavior and deter investor confidence in the securities markets. Even if the statute appears to be facially unambiguous, judicial interpretation illustrates that there is some ambiguity in the statute's language. This ambiguity necessitates an analysis of Prong A in conjunction with the subjective element of Prong B.

Although some circuits strictly adhere to the text, such an analysis is incomplete and ignores application of the text to factual analysis. Cases that followed plain-text interpretation were rightfully reluctant to do so. The SEC's primary concern from the outset of this legislation was to ensure truthfulness, as were the initial judicial decisions surrounding the bespeaks-caution doctrine. The evidence does not support a conclusion that Congress could have intended for sophisticated, publicly traded companies to be permitted to disseminate false or misleading statements into the public marketplace under the guise of sufficient cautionary language. Therefore, the statutory safe-harbor provision should not protect forward-looking statements that are made by a speaker with knowledge that they are false or misleading, even when accompanied by meaningful cautionary language.

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640 F.2d 534, 543 (5th Cir. 1981), *rev'd in part on other grounds*, 459 U.S. 375 (1983)) (stating that cautionary language cannot protect false or misleading statements that were made knowingly).